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2 BEFORE THE PERSONNEL APPEALS BOARD

3 STATE OF WASHINGTON

4  
5 BETTY HATTER,

6 Appellant,

7 v.

8 EMPLOYMENT SECURITY DEPARTMENT,

9 Respondent.  
10

) Case No. DISM-02-0096

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

11  
12 I. INTRODUCTION

13 1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD  
14 L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at the office of  
15 the Personnel Appeals Board, in Olympia, Washington, on December 2 and December 3, 2003.  
16 WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

17 1.2 **Appearances.** Appellant Betty Hatter was present and represented herself *pro se*. Adrienne  
18 Harris, Assistant Attorney General, represented Respondent Employment Security Department.  
19

20 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of  
21 duty, inefficiency, insubordination, malfeasance, gross misconduct, and willful violation of  
22 published employing agency or Department of Personnel rules or regulations. Respondent alleges  
23 that Appellant discarded unprocessed and incorrectly processed work into the recycle barrel;  
24 disregarded reasonable directives from her manager to meet with her; and used state equipment,  
25 including her phone and computer, for unauthorized purposes.  
26

## II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Employment Security Department. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on December 8, 2002.

2.2 Appellant began her employment with the Employment Security Department on July 1, 1987. At the time of her dismissal, Appellant was a Tax Specialist 3 with the Unemployment Insurance Tax, Experience Rating/Benefit Charging Unit of the Unemployment Insurance Division.

2.3 By letter dated November 8, 2002, Cynthia Harris, Assistant Commissioner of the Administrative Services Division, informed Appellant of her immediate suspension followed by dismissal effective November 11, 2002. Ms. Harris charged Appellant with neglect of duty, inefficiency, insubordination, malfeasance, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Ms. Harris alleged that Appellant discarded unprocessed and incorrectly processed work into the recycle barrel; disregarded reasonable directives from her manager to meet with her; and used state equipment, including her phone and computer, for unauthorized purposes.

2.4 Appellant had no history of prior formal disciplinary action; however, her personnel file included the following:

- A July 12, 2002 Memo of Understanding addressing Appellant's failure to adhere to her work schedule.
- A January 7, 2002 Letter of Reprimand addressing an inappropriate remark made by Appellant that was perceived as threatening.

- A December 31, 2001 Failure to Follow Instructions Memo addressing Appellant's failure to request leave in advance, and notifying Appellant that her work schedule was being changed to a standard Monday through Friday schedule.
- A December 10, 2001 Follow-Up to the memo of Understanding addressing Appellant's failure to adhere to lunch breaks and to request leave in advance.
- A December 4, 2001 Memo of Understanding addressing Appellant's failure to adhere to established arrival time, breaks, lunch period, and to request leave in advance.

2.5 As a Tax Specialist 3, Appellant's duties included acting as a liaison and representing the agency to district tax offices and employers within the state, monitoring tax rates and benefit charges to employer accounts, and making adjustments to tax rates and benefit charges when appropriate.

2.6 Employment Security Department Policy #1016, Employee Conduct, states that state-owned equipment is to be used for official state business only and directs employees to:

- Be economical in using agency resources
- Use work time appropriately
- Refrain from using their position for private gain or advantage
- Avoid conflicts of interest between personal interest and official duties
- Refrain from interviewing or referring individuals to employers for the purpose of obtaining jobs

2.7 Employment Security Department Policy #2009, Use of Agency Telecommunication Technology System, defines agency telecommunications technology resources as including, but not limited to, telephone systems, voice mail, cell phones, SCAN, pagers, and FAX machines.

2.8 Employment Security Department Policy #2009, SCAN for Long Distance Calls, directs employees to use the SCAN system for official agency business only and states that personal use of the SCAN system may subject employees to disciplinary action.

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2 2.9 Employment Security Department Policy #2016, Use of Agency Technology Systems Risk  
3 Statement, states that employees are obligated to conserve and protect state resources for the benefit  
4 of public interest rather than for their private interest.

5  
6 2.10 It is undisputed that, during her employment with the Employment Security Department  
7 (ESD), Appellant's doctor diagnosed her as having a respiratory condition in 1994 and ESD  
8 subsequently accommodated her in various ways for that respiratory condition.

9  
10 2.11 Appellant denied all the allegations set forth in her disciplinary letter. In making a  
11 determination of the allegations, we carefully weighed the testimony of the witnesses and reviewed  
12 the documentary evidence in this case. Based on a preponderance of the credible testimony and  
13 documentary evidence, we find that the following occurred:

14  
15 2.12 *Allegation #1*

16 During May 2002, Elena Perez, Unit Manager, observed Appellant discarding into the recycle  
17 barrel a large stack of papers, which had been on her desk for quite some time. Ms. Perez retrieved  
18 the documents from the recycle barrel and discovered they were work papers that had not been  
19 processed or had been processed incorrectly. In an effort to verify that the documents were  
20 incomplete work papers, Ms. Perez checked the computer system and confirmed that no database  
21 entries had been performed as necessary to complete or correct the processing of the documents.  
22 As a result, incorrect charges were being applied to various ESD client accounts.

23  
24 2.13 *Allegation #2*

25 After attempting several times to establish a mutually agreeable time to meet with Appellant, Ms.  
26 Perez sent an e-mail to Appellant dated January 30, 2002. The e-mail directed Appellant to attend a

1 meeting for the purpose of reviewing work expectations that had been established for Appellant's  
2 unit. Appellant's work unit had developed the work expectations during a previous meeting which  
3 Appellant had not attended. Ms. Perez's e-mail stated in part, "I am directing you to attend the  
4 meeting scheduled for 3:00, January 31, 2002, in the Commissioner's Conference Room." Without  
5 notifying Ms. Perez, Appellant failed to appear for the meeting as directed.

6  
7 *2.14 Allegation #3*

8 During May 2002, a report of Appellant's telephone use indicated that Appellant answered 120  
9 incoming calls and made 715 outgoing local calls on her direct line. Since clients normally call in  
10 on the unit phone as opposed to Tax Specialists' direct lines, and Appellant's clients were long  
11 distance, the numerous calls from her direct line could not have been work-related.

12  
13 *2.15* Appellant's May 2002 SCAN bill also indicated that she spent 41 minutes on long distance  
14 calls that did not appear to be work-related. Ms. Perez further examined Appellant's SCAN bills  
15 dated January 2001 through June 2002, and discovered 129 SCAN calls that could not have been  
16 work-related because they were to colleges and universities, businesses outside the state of  
17 Washington, businesses not registered with ESD, religious organizations, calls to the state of  
18 Tennessee, and a modeling agency.

19  
20 *2.16* Further, a search of the e-mail history on Appellant's computer indicated several non-work  
21 related e-mails between May 2000 and March 2002. The non-work related e-mails revealed  
22 Appellant's efforts, during work hours, to assist others in securing employment due to various job  
23 announcements, applications, and resumes included in the e-mails. One example dated February  
24 21, 2002 from Carol Stevenson stated:

25  
26 Hi Betty: I'm checking to see if you have received Kimario's application yet. If you have,  
do you know of any employment leads he can follow up on at this time?

1  
2 2.17 By letter dated July 25, 2002, Nikki Barnard, Director of Human Resources Management,  
3 informed Appellant that the department was considering taking formal disciplinary action against  
4 her up to and including dismissal. In her letter, Ms. Barnard cited numerous examples of  
5 incomplete work or work that Appellant had processed incorrectly. Ms. Barnard stated that the  
6 incomplete and incorrectly processed work had to be assigned to other members of Appellant's  
7 work unit. Ms. Barnard's letter states in part:

8  
9 One claim was found in the recycle barrel that required forwarding to the State of Oregon  
and a second that required scheduling for an appeal. You had done nothing with either.

10  
11 You denied relief charges on eighteen requests from employers. Then, when the employers  
12 appealed, you reversed your decision without obtaining any additional information  
13 regarding the request. For example, you inappropriately denied relief charges to an  
employer stating that misconduct had not been found even though the claimant admitted to  
the theft of over \$1,500.00. The facts clearly showed misconduct and had you applied the  
misconduct appropriately, the employer would not have had to appeal your decision.

14  
15 2.18 On August 9, 2002, Ms. Barnard conducted a pre-disciplinary meeting to allow Appellant an  
16 opportunity to respond to the allegations, which Appellant chose not to attend. Rather, on August  
17 7, 2002, Appellant responded in writing and denied the allegations against her. Appellant stated  
18 that she had been subjected to harassment and a hostile work environment, and she had performed  
19 her job well according to her performance evaluations.

20  
21 2.19 By letter dated November 14, 2002, Annette Copeland, Assistant Commissioner of the  
22 Unemployment Insurance Division, informed Appellant that ESD would consider a lesser discipline  
23 than dismissal, if Appellant agreed to negotiate conditions that would allow her to return to work.  
24 Ms. Copeland stated in her letter that if Appellant had not contacted her by November 18, 2002, she  
25 would assume that Appellant had decided to allow the dismissal to go into effect. Appellant failed  
26 to contact Ms. Copeland by the deadline.

1  
2 2.20 Cynthia Harris, Assistant Commissioner of the Administrative Services Division, reviewed  
3 Appellant's SCAN billings, reports concerning her telephone use, e-mail history, and Appellant's  
4 written responses to the allegations. Ms. Harris was not convinced by Appellant's denials of the  
5 allegations and concluded that Appellant had failed to provide any mitigating circumstances for her  
6 actions.

7  
8 2.21 Ms. Harris determined that Appellant's actions were unacceptable and that she had engaged  
9 in neglect of duty, inefficiency, insubordination, malfeasance, gross misconduct, and willful  
10 violation of agency policies.

11  
12 2.22 In determining the level of discipline, Ms. Harris reviewed the relevant agency policies and  
13 Appellant's personnel file, including the memos of understanding and letter of reprimand. Ms.  
14 Harris considered the adverse impact and the level of risk Appellant's actions had caused the  
15 agency. Ms. Harris also considered the efforts the agency had made to resolve the situation and to  
16 avoid terminating Appellant, as well as Appellant's lack of response and cooperation to those  
17 efforts. Ms. Harris concluded that substantial disciplinary action was necessary and termination  
18 was the appropriate sanction based on the severity of Appellant's misconduct.

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21 **III. ARGUMENTS OF THE PARTIES**

22 3.1 Respondent argues that Appellant discarded work that either was not completed or was  
23 processed incorrectly. Respondent asserts that the incomplete and incorrectly processed work had  
24 to be assigned to other members of Appellant's work unit. Respondent contends that Appellant  
25 discarded unprocessed and incorrectly processed work into the recycle barrel. Respondent argues  
26 that Appellant disregarded a directive from her manager to meet with her on January 31, 2002 to

1 review work expectations. Respondent asserts that Appellant had numerous telephone calls on her  
2 direct phone line that were not work-related and incurred non-work related charges on her SCAN  
3 bill. Respondent argues that Appellant frequently used her e-mail for personal correspondence.  
4 Respondent asserts that Appellant did not cooperate with the agency's efforts to resolve the  
5 situation to avoid terminating her. Respondent contends that termination was the appropriate  
6 sanction in this case and asks the Board to uphold that decision.

7  
8 3.2 Appellant argues that she was discriminated against because of her race and her respiratory  
9 disability. Appellant asserts she was harassed and forced to work in a hostile work environment.  
10 Appellant contends she was a state employee for over 15 years, and her performance evaluations  
11 demonstrate that she performed her duties well. Appellant argues she did not discard her work into  
12 the recycle barrel. Appellant asserts that receiving job opportunities through e-mail did not indicate  
13 she was acting as a job counselor. Appellant contends that her friends and acquaintances were not  
14 interested in state employment. Appellant argues she received telephone calls on her direct line as  
15 well as the unit line, and that employers could call in to obtain information regarding  
16 unemployment insurance without being registered with ESD. Appellant asserts her respiratory  
17 condition prevented her from attending meetings that were scheduled in the conference room.  
18 Appellant contends the agency unfairly terminated her rather than implementing progressive  
19 correction action according to the Merit System Rules.

#### 20 21 **IV. CONCLUSIONS OF LAW**

22 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
23 herein.

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25 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
26 the charges upon which the action was initiated by proving by a preponderance of the credible



1 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
2 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
3 Corrections, PAB No. D82-084 (1983).

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5 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
6 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
7 of Social & Health Services, PAB No. D86-119 (1987).

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9 4.4 Respondent has met its burden of proving that Appellant neglected her duty when she  
10 discarded her work into the recycle barrel. As an employee, Appellant had a duty to complete all  
11 work assigned to her. Appellant further neglected her duty to comply with department policies  
12 instructing her to use her work time appropriately and to use her telephone, SCAN line, and e-mail  
13 system for work-related purposes only.

14  
15 4.5 Inefficiency is the utilization of time and resources in an unproductive manner, the  
16 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of  
17 effective operations as measured by a comparison of production with use of resources, using some  
18 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*  
19 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

20  
21 4.6 Respondent has met its burden of proving that Appellant was inefficient when she discarded  
22 her work into the recycle barrel. Appellant was also inefficient when she used her state owned  
23 telephone, SCAN system, and e-mail system for non-work related purposes during work time rather  
24 than perform the duties of her position. Appellant clearly failed to utilize her work time  
25 appropriately and efficiently.

1 4.7 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
2 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.  
3 Dep't of Social & Health Services, PAB No. D94-025 (1995).

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5 4.8 Respondent has met its burden of proving that Appellant was insubordinate when she  
6 disregarded Ms. Perez's specific directive to attend the meeting scheduled for January 31, 2002.

7  
8 4.9 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to  
9 do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with  
10 the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-  
11 135 (1995).

12  
13 4.10 Respondent has met its burden of proving that Appellant engaged in malfeasance when she  
14 incurred costs and charges by using her SCAN system for personal reasons.

15  
16 4.11 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry  
17 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
18 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
19 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

20  
21 4.12 Respondent has met its burden of proving that Appellant's actions rose to the level of gross  
22 misconduct when she failed to complete her work or to process her work accurately, which resulted  
23 in incorrect charges being applied to ESD client accounts. Further, Appellant's actions caused the  
24 agency to receive unnecessary appeals from clients. affecting the agency's credibility and ability to  
25 provide quality customer service. In addition, Appellant's incomplete and incorrectly processed  
26 work had to be assigned to other members of Appellant's work unit.

1  
2 4.13 Willful violation of published employing agency or institution or Personnel Resources  
3 Board rules or regulations is established by facts showing the existence and publication of the rules  
4 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
5 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

6  
7 4.14 Respondent has met its burden of proving that Appellant willfully violated Employment  
8 Security Department Policy #1016, Employee Conduct; Employment Security Department Policy  
9 #2009, Use of Agency Telecommunication Technology System; Employment Security Department  
10 Policy #2009, SCAN for Long Distance Calls; and Employment Security Department Policy #2016,  
11 Use of Agency Technology Systems Risk.

12  
13 4.15 Although it is not appropriate to initiate discipline based on prior formal and informal  
14 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
15 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
16 D93-163 (1995).

17  
18 4.16 In determining whether a sanction imposed is appropriate, consideration must be given to  
19 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
20 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
21 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
22 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

23  
24 4.17 We considered Appellant's egregious behavior, the adverse impact that Appellant's actions  
25 had on the agency, the agency's efforts to resolve the situation and avoid terminating Appellant, and  
26 Appellant's lack of response and cooperation to those efforts. We conclude that Respondent has

1 established that the disciplinary sanction of dismissal was not too severe and was appropriate under  
2 the circumstances presented here. Therefore, the appeal should be denied.

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**V. ORDER**

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NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Betty Hatter is denied.

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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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WASHINGTON STATE PERSONNEL APPEALS BOARD

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\_\_\_\_\_  
Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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